

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JIM J. PERRYMAN**

Claimant

VS.

**GRAND ISLAND CONTRACT CARRIERS, INC.**

Respondent

Self-Insured

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Docket No. 248,754

**ORDER**

Respondent requested Appeals Board review of Administrative Law Judge John D. Clark's December 16, 1999, preliminary hearing Order.

**ISSUES**

This is a claim for a low-back injury that allegedly occurred on September 14, 1999, in Oxford, Mississippi, while claimant was employed by the respondent. The Administrative Law Judge found the parties were subject to the Kansas Workers Compensation Act (KWCA) and claimant proved his low-back injury was work related. Respondent was ordered to pay past medical expenses, an authorized treating physician was appointed, and respondent was ordered to pay claimant temporary total disability benefits.

Respondent appeals and contends the parties are not subject to the KWCA because the accident occurred in Mississippi and neither was the place of employment in Kansas nor was the contract of employment made in Kansas.<sup>1</sup> Also, respondent contends claimant's low-back injury did not arise out of or in the course of the employment.

In contrast, claimant requested the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order.

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<sup>1</sup>See K.S.A. 44-506.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board makes the following findings and conclusions:

In August of 1999, claimant was out of work, and at the suggestion of a truck driver acquaintance, he telephoned the respondent concerning employment possibilities. The respondent sent claimant an employment application. Claimant completed the employment application and returned it to the respondent in Grand Island, Nebraska. Respondent's safety director, Diana Kelly, telephoned the claimant at his home in Wichita, Kansas, and offered claimant an over-the-road truck driving job. Claimant was instructed to meet one of respondent's drivers in Wichita, Kansas, and ride back with him to Grand Island to complete additional employment requirements such as a medical examination and a drug test.

The respondent's employment application under Section II, Acknowledgments, states as follows: "I acknowledge that the company may request, as a condition of any offer of employment that is made or for continued employment, that I undergo a medical exam or drug testing . . . ." The claimant testified he was aware the medical examination and drug test were a condition of the employment.

Respondent contends the employment contract was clearly not made until the claimant traveled to Grand Island, Nebraska. Respondent argues that the employment offer was contingent on the claimant passing the physical examination and the drug test. Accordingly, the respondent contends the contract of employment was not made until claimant successfully passed both the medical examination and drug test in Grand Island, Nebraska.

The contract of employment is made where and when the last act necessary for its formation is completed.<sup>2</sup> The contract of employment is made where the acceptor, during a telephone conversation, speaks his or her acceptance.<sup>3</sup>

Here, the formation or creation of the contract was completed when claimant accepted respondent's employment offer during a telephone conversation between respondent located in Grand Island, Nebraska, and claimant located in Wichita, Kansas. The successful completion of the medical examination and the drug test was a condition subsequent to the contract and not a condition precedent. Accordingly, the Appeals Board finds these two conditions did not prevent the existence of the employment contract.<sup>4</sup>

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<sup>2</sup>See Smith v. McBride & Dehmer Construction, Co., 216 Kan. 76, 530 P.2d 1222 (1975).

<sup>3</sup>See Morrison v. Hurst Drilling Co., 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973).

<sup>4</sup>See Shehane v. Station Casino, Docket No. 83,083 (Kan. App. 2000).

The Appeals Board agrees with the Administrative Law Judge's decision that the parties are subject to the KWCA.

The respondent further contends that the preliminary hearing record proves that claimant is not credible, and therefore, he failed to prove his low-back injury was related to his work. In claimant's some 19 years of work history, he has made claims for work-related low-back injuries from eight different employers. The medical records admitted into evidence show that as far back as 1985 orthopedic surgeon Robert L. Eyster, M.D., treated claimant for a bulging or herniated disc at the L4-5 region. In fact, as late as January 11, 1999, Dr. Eyster again treated claimant for a low-back injury. At that time, Dr. Eyster found an MRI examination showed degenerative changes in the lower three discs of claimant's low back, but no significant herniated disc. He released claimant with work restrictions for six months and then indicated claimant may return to regular work. Dr. Eyster's restrictions were not in effect at the time claimant was employed by the respondent.

Claimant alleges he injured his back while he was placing a tarp on a load of lumber on one of respondent's trucks in Oxford, Mississippi. After the injury, claimant notified respondent of the injury. He then was able to drive respondent's truck back to Wichita, Kansas, where the respondent sent another driver to deliver the lumber to its destination.

The first physician claimant saw after the accident was Antonio L. Osio, M.D., in Wichita, Kansas. Dr. Osio had claimant undergo an MRI examination that showed degenerative disc changes with herniated disc at L4-5. Dr. Osio then referred claimant to orthopedic surgeon Ely Bartal, M.D.,

Claimant first saw Dr. Bartal on October 4, 1999. Claimant gave Dr. Bartal a history of 19 years of back problems. Dr. Bartal reviewed the 1998 MRI examination that only showed degenerative disc disease with the recent September 1999 MRI examination that showed a herniated central disc at L4-5. The doctor recommended an epidural block injection and if no improvement, then surgical possibilities would be explored.

The Appeals Board concludes claimant has proven, through his testimony and the medical records admitted into evidence at the preliminary hearing, that he aggravated a preexisting low-back condition while working for the respondent. In a workers compensation case, a preexisting condition that is either aggravated or accelerated by a work-related accident is a compensable injury.<sup>5</sup>

The Administrative Law Judge observed the claimant testify in person. Claimant admitted he had some eight different low-back workers compensation claims involving some eight separate employers. Claimant also admitted he had been less than truthful when he answered questions about the previous back injuries on the employment

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<sup>5</sup> See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

application. Nevertheless, the Administrative Law Judge found claimant was telling the truth about this low-back injury. The Appeals Board finds some deference should be given to the Administrative Law Judge because he had the opportunity to judge claimant's credibility.

The Appeals Board, therefore, agrees with the Administrative Law Judge and affirms his decision that claimant aggravated a preexisting low-back condition while working for the respondent on September 14, 1999.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's December 16, 1999, preliminary hearing Order, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
Vaughn Burkholder, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director